

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

V.

SYED SAADET ALI FARA SHAH,

Defendant.

Case No.: 02-cr-2912-L

ORDER

Defendant Syed Saadet Ali Fara Shah (“Shah”) filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to section 2255, which was denied on September 30, 2016, by this Court. [ECF NOS. 184, 237.] Defendant filed a notice of appeal in the Ninth Circuit on March 9, 2017. [ECF NO. 242.]

On April 13, 2017, the Ninth Circuit remanded the case to this Court noting that Defendant's notice of appeal was filed past the 60 days allowed from entry of final judgment to appeal, however, Defendant was not served with a copy of the final order and judgment until February 21, 2017. *U.S. v Shah*, No. 17-55322 at 1 (9th Cir. Apr. 13, 2017). The appellate court directed this Court to consider whether Defendant's notice of appeal may be treated as a timely motion to reopen the time for appeal pursuant to Federal Rule of Appellate Procedure 4(a)(6), and if so, whether relief should be granted. (*Id.* at 2.)

1 For the following reasons, the Court finds that Defendant's notice of appeal should
2 be treated as a timely motion to reopen the time for appeal. Under Rule 4(a)(6):

3 The district court may reopen the time to file an appeal for a period of 14
4 days after the date when its order to reopen is entered, but only if all the
5 following conditions are satisfied:

6 (A) the court finds that the moving party did not receive notice under
7 Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order
8 sought to be appealed within 21 days after entry;
9 (B) the motion is filed within 180 days after the judgment or order is entered
10 or within 14 days after the moving party receives notice under Federal Rule
11 of Civil Procedure 77(d) of the entry, whichever is earlier; and
12 (C) the court finds that no party would be prejudiced.

13 Fed. R. App.Pr.4(a)(6).

14 Defendant meets the first prong of Rule 4 because his section 2255 motion was
15 denied on September 30, 2016, however, Shah was not served with the final order and
16 judgment until February 21, 2017, 144 days after judgment was issued, clearly after the
17 21 days required under the Rule. Defendant also meets the second criteria set forth in
18 Rule 4 as he filed a notice of appeal on March 9, 2017, 160 days after judgment was
19 entered. In light of the fact that Defendant was not served with the judgment within 21
20 days of its entry, and he filed his notice of appeal within 180 days after judgment was
21 entered, he has met the timing criteria set forth in Rule 4(a)(6).

22 Moreover, no party will be prejudiced by Defendant's filing of his notice of appeal,
23 as the government will have ample opportunity to respond to the issues raised in
24 Defendant's appeal. This result comports with Federal Rule of Civil Procedure 77(d)
25 which requires that a court clerk immediately serve notice of an order of judgment but
26 specifies that “[l]ack of notice of the entry does not affect the time for appeal.” Fed. R
27 Civ. P. 77(d).

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1 For the foregoing reasons, the Court determines that Defendant's notice of appeal
2 may be treated as a timely motion to reopen the time for appeal.

3 **IT IS SO ORDERED**

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5 Dated: May 9, 2017

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Hon. M. James Lorenz
United States District Judge